

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jeremy Pinson,

Plaintiff,

v.

United States Department of Justice, et
al.,

Defendants.

No. CV 19-00235-TUC-RM

ORDER

Plaintiff Jeremy Pinson, who is currently confined in the United States Penitentiary (“USP”)-Coleman, brought this civil rights action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), 28 U.S.C. § 1331, the Federal Tort Claims Act (“FTCA”), and 5 U.S.C. § 702. (Doc. 8.) Defendants move for summary judgment, and Plaintiff opposes.¹ (Docs. 102, 114.)

I. Background

In her First Amended Complaint, Plaintiff relevantly alleged as follows. Plaintiff was diagnosed with gender dysphoria in 2015 and was prescribed hormone therapy and gender-affirming surgery, but in 2019, Defendant Brieschke advised Defendant Dr. Haight-Biehler that Plaintiff’s treatments were prohibited; Plaintiff’s treatments were categorically denied, and Plaintiff’s hormones were subject to repeated interruptions.

¹ The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc) regarding the requirements of a response. (Doc. 108.)

1 (Doc. 10 at 4.) While at USP-Tucson, Plaintiff consistently sought gender-affirming
2 surgery, electrolysis, and hormone therapy. (Doc. 8 at 2.) In her request for relief, Plaintiff
3 relevantly sought monetary damages and an order compelling the Federal Bureau of
4 Prisons (“BOP”) to provide gender-affirming surgery, hormone therapy and other gender
5 dysphoria accommodations, such as makeup, housing in female prison, electrolysis, and
6 beard trimmers. (Doc. 8 at 6.)

7 On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated
8 claims for injunctive relief against the United States and the BOP and an Eighth
9 Amendment medical care claim against Defendants Haight-Biehler and Brieschke. (Doc.
10 10.) The Court also found that Plaintiff alleged the existence of a policy that facially
11 discriminates on the basis of sex because Plaintiff alleged that she is denied care with no
12 individualized determination as to medical necessity solely because the care would
13 constitute gender-affirming surgery. (*Id.*) The Court dismissed the remaining claim. (*Id.*)

14 In an August 13, 2020 Order, the Court partially granted summary judgment in favor
15 of Defendants as to Plaintiff’s claims relating to seeing an endocrinologist, electrolysis,
16 feminine hygiene items, and transfer to a female facility based on Plaintiff’s failure to
17 properly exhaust her administrative remedies as to those claims. (Doc. 43.) The Court
18 noted that the remaining claims in this action are Plaintiff’s Eighth Amendment and
19 injunctive relief claims relating to: (a) Plaintiff’s allegations that she was improperly
20 denied gender-affirming surgery, including the existence of a policy that facially
21 discriminates on the basis of sex because Plaintiff alleged that she is denied care with no
22 individualized determination as to medical necessity solely because the care would
23 constitute gender-affirming surgery, and (b) Plaintiff’s allegations regarding changing her
24 Estradiol therapy from pills to a patch. (*Id.*)

25 Defendants now move for summary judgment on those remaining claims.

26 **II. Summary Judgment Standard**

27 A court must grant summary judgment “if the movant shows that there is no genuine
28 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

1 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The
 2 movant bears the initial responsibility of presenting the basis for its motion and identifying
 3 those portions of the record, together with affidavits, if any, that it believes demonstrate
 4 the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

5 If the movant fails to carry its initial burden of production, the nonmovant need not
 6 produce anything. *Nissan Fire & Marine Ins. Co. v. Fritz Co.*, 210 F.3d 1099, 1102-03
 7 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the
 8 nonmovant to demonstrate the existence of a factual dispute and to show (1) that the fact
 9 in contention is material, i.e., a fact that might affect the outcome of the suit under the
 10 governing law, and (2) that the dispute is genuine, i.e., the evidence is such that a
 11 reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*,
 12 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216,
 13 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact
 14 conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-
 15 89 (1968); however, it must “come forward with specific facts showing that there is a
 16 genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
 17 587 (1986) (internal citation omitted); *see Fed. R. Civ. P. 56(c)(1)*.

18 At summary judgment, the judge’s function is not to weigh the evidence and
 19 determine the truth but to determine whether there is a genuine issue for trial. *Anderson*,
 20 477 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence and draw
 21 all inferences in the nonmovant’s favor. *Id.* at 255. The court need consider only the cited
 22 materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

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1 **III. Facts²**

2 Plaintiff Jeremy Pinson is in the custody of the BOP and is projected to be released
 3 from custody on August 12, 2026. (Doc. 103 ¶¶ 1-2.) Plaintiff was incarcerated at USP-
 4 Tucson from February 15, 2018 through December 4, 2020, and currently is incarcerated
 5 at USP-II Coleman. (*Id.* ¶ 3.) Plaintiff is a high security prisoner with maximum custody
 6 needs. (*Id.* ¶ 4.)³ As the Warden noted on September 16, 2019,

7 Her overall institutional adjustment is rated as poor. Pinson is
 8 a “High” security “MAX” custody inmate whose custody
 9 classification score is 27. Her custody classification form,
 10 dated June 28, 2019, scores her with serious violence under
 11 five years ago. She also has a serious disciplinary history of
 12 violence toward staff and inmates. Inmate Pinson has been
 13 assigned the following STG’s [Security Threat Groups]:
 14 Advanced Computer Skills, Assault-Correctional, Explosives
 15 Expert, History of Compromising Staff, History of Defeating
 16 Restraints, History of Introduction, History of Arson, History
 17 of Fraud, History of Mail Abuse, History of Threats Toward
 18 Staff, Posted Picture Card File, Secret Service List, and Threats
 19 to the Judiciary.

20 (*Id.* ¶ 5.)

21 On December 16, 2015, Plaintiff was prescribed Estradiol for the first time. (*Id.*
 22 ¶ 6.) The Estradiol prescription was in patch form. (*Id.*) Plaintiff’s Estradiol patch
 23 prescriptions were renewed/continued through a prescription on March 23, 2016. (*Id.*) On
 24 April 8, 2016, Plaintiff complained about the adhesion of the Estradiol patch because, after
 25 two days of showering, the patch would peel off. (*Id.* ¶ 7.) At that time, Plaintiff requested
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27 ² Plaintiff disputes several facts, but in several instances, it is unclear what the nature
 28 of her dispute is or what evidence she relies on for the dispute. In some of her disputes,
 Plaintiff mischaracterizes evidence, makes disputes based on irrelevant information, or
 attempts to testify to facts for which she has not established a competency to testify.
 Accordingly, the Court does not note Plaintiff’s disputes where she has not supported the
 dispute with competent, relevant evidence.

³ Plaintiff asserts that she no longer “has maximum custody needs.” (Doc. 115 ¶ 4.)
 Plaintiff asserts that she “did what [she] had to do to stay in maximum custody” so that she
 would be isolated from male members of the population to protect herself. (Doc. 115-1 ¶¶
 2-3.)

1 to switch from the Estradiol patch to the Estradiol pill, and the prescription was changed
2 accordingly. (*Id.* ¶ 7.) Between April 2016 and February 15, 2018, Plaintiff continued to
3 be prescribed Estradiol pills as part of her hormone therapy. (*Id.* ¶ 8.)

4 Plaintiff was transferred to USP-Tucson on February 15, 2018 and arrived with a
5 current prescription for Estradiol tablets dating back to April 2016. (*Id.* ¶ 8.) The
6 prescription was continued until December 17, 2018, when Plaintiff requested that her
7 estrogen be changed from a pill to a patch, at which time Plaintiff's Estradiol prescription
8 was changed to a .025mg Estradiol patch. (*Id.* ¶ 9.) Plaintiff asserts that she repeatedly
9 requested that Dr. Ash and Dr. Biehler change her estrogen to patch or injection form
10 between February 14, 2018 until it was changed in December 2018. (Doc. 115-1 ¶ 5.)

11 Plaintiff's medical records do not show any prior requests to change her estrogen
12 from a pill to a patch. (Doc. 103 ¶ 10.) Plaintiff's medical records show that on July 24,
13 2018, Plaintiff discussed an interest in stopping her estrogen therapy as she believed that
14 she already had achieved all of the body changes she would from the therapy. (*Id.* ¶ 11.)
15 Plaintiff asserts that she sought a change in her estrogen therapy because she was frustrated
16 the therapy was not working, and was told that she needed to be prescribed Lupron. (Doc.
17 115 ¶ 10; Doc. 115-1 ¶ 9.) Plaintiff submitted a single BP-8 regarding changing her
18 estrogen from a pill to a patch on December 10, 2018, and later submitted a BP-9 on the
19 issue, but the change had already been made. (Doc. 103 ¶ 12.)

20 Defendant Dr. Haight-Biehler wrote recurring orders for blood work, including
21 testing for levels of Testosterone and Estradiol. (*Id.* ¶ 13.) Plaintiff's hormone therapy
22 was adjusted in attempts to get her testosterone level to a target range. (*Id.* ¶ 14.) The
23 target testosterone for gender-affirming surgery is under 55 ng/dl, and when Plaintiff was
24 at USP-Tucson, Plaintiff's testosterone levels were 368, 152, 83, 310, 267, 281, 656 and
25 373. (*Id.* ¶ 15.) Plaintiff asserts that her levels were not "regularly tested." (Doc. 115-1
26 ¶ 13.)

27 A testosterone level above the target level means that the feminizing effect of the
28 estradiol will not be manifested to the desired level. (Doc. 103 ¶ 16.) For feminizing

1 hormones to achieve this effect, the estradiol has to be able to overcome the more powerful
 2 “native” testosterone, which is the reason for the attempted suppression of the testosterone
 3 to the target range. (*Id.*) Failure to achieve this will result in incomplete and likely
 4 undesirable effects, even if surgery was to be performed. (*Id.*)

5 Plaintiff has received regular mental health care while in custody, including over
 6 1,000 contacts with psychology staff and 121 suicide risk assessments. (*Id.* ¶ 17.) She
 7 engages in self-directed harm. (*Id.*) In December 2018, Plaintiff submitted requests for
 8 vaginoplasty (gender-affirming surgery.) (*Id.* ¶ 18.) On December 15, 2018, she was
 9 notified that the Warden would send a request to the BOP’s Transgender Executive Council
 10 (“TEC”) for consideration. (*Id.* ¶ 19.)⁴

11 On December 19, 2018, the Warden requested that the TEC review Plaintiff’s
 12 request for gender-affirming surgery. (*Id.* ¶ 20.) The Warden explained that Plaintiff had
 13 been diagnosed with gender dysphoria in June 2015, validated transgender male to female
 14 in October 2015, and provided hormone medications Estradiol and Spironolactone since
 15 April 2016. (*Id.* ¶ 21.) The Warden noted that whether hormone treatment had been
 16 successful was debatable and that Plaintiff had not met the condition of full-time real life
 17 experience in the preferred gender due to her continuous incarceration since the diagnosis.
 18 (*Id.* ¶ 23.)

19 On January 28, 2019, the Warden’s office received Plaintiff’s December 10, 2018,
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21 ⁴ The TEC offers advice and guidance on measures related to the unique treatment
 22 and management needs of transgender prisoners and/or prisoners with gender dysphoria,
 23 including housing and health issues. (*Id.* ¶ 53.) The TEC is a multi-disciplinary committee
 24 and consists of staff members from the BOP’s Reentry Services Division, Health Services
 25 Division, and Correctional Programs Division. (*Id.* ¶ 54.) The TEC includes staff with
 26 diverse specialty areas. (*Id.* ¶ 55.) Current TEC members include the National Policy
 27 Coordinator, two psychologists, a psychiatrist, a pharmacist and two Bureau designations
 28 experts. (*Id.*) Three of the members are Senior Deputy Assistant Directors and two are
 Branch Chiefs in relevant specialty areas (psychology and psychiatry). (*Id.*) Leadership
 from the BOP’s Designation and Sentence Computation Center—a component of the BOP
 created to centralize prisoner designation (i.e., placement) within Bureau institutions—
 provides the TEC with expertise on placement options for transgender prisoners. (*Id.* ¶
 58.)

1 BP-9 Requests seeking testicle removal surgery and vaginoplasty. (*Id.* ¶ 24.) The BP-9s
2 were consolidated, and the Warden responded that Plaintiff had submitted a request for
3 gender reassignment surgery in December 2018 and a request had been sent to the TEC for
4 consideration. (*Id.* ¶ 25.)

5 On February 8, 2019, “after discussion with TEC committee medical advisor,” Dr.
6 Haight-Biehler increased Plaintiff’s Spironolactone dosage, which is used to repress
7 testosterone, from 150 mg per day to 200 mg per day. (*Id.* ¶ 26.)

8 On May 1, 2019, Plaintiff’s levels were Testosterone 310 and Estradiol 30. (*Id.*
9 ¶ 27.) On September 16, 2019, the Warden again requested the TEC to review Plaintiff’s
10 request for gender-affirming surgery and also requested consideration for redesignation to
11 a lower security facility. (*Id.* ¶ 28.) The Warden explained Plaintiff’s hormone treatment
12 through the years and noted that she had been participating in appropriate psychotherapy.
13 (*Id.* ¶ 29.) The Warden noted that the condition of full-time real life experience in the
14 preferred gender had not been met as Plaintiff had been incarcerated since diagnosis and
15 that she had a projected release date of May 23, 2026. (*Id.* ¶ 30.) The Warden requested
16 “transfer consideration to a lesser security institution which can accommodate Medical
17 Care Level 2 and Mental Health Care Level 3 prisoners. This will allow inmate Pinson
18 forward progression towards the goal of meeting condition of full-time, real life experience
19 in the preferred gender.” (*Id.* ¶ 31.) The Warden also included the required information
20 about Plaintiff’s institutional adjustment, high security, maximum custody, STGs and
21 disciplinary history, including violence toward both staff and prisoners. (*Id.* ¶ 32.) The
22 Warden sought “guidance for progression to the next phase, in the event redesignation to a
23 lesser security institution is not approved.” (*Id.* ¶ 33.) The request was for a lower security
24 male institution, not a female institution. (*Id.* ¶ 34.)

25 The TEC views achieving target hormone levels as a first step for transgender
26 women moving to a female facility. (*Id.* ¶ 38.) When transgender women maintain their
27 target hormone levels, they become more feminine in appearance, lose muscle mass,
28 experience lower libido and are not able to maintain erections. (*Id.* ¶ 38.) All of these

1 feminizing effects are important for their ability to live in a female institution and for the
2 safety of women who would be their peers at the institution. (*Id.* ¶ 39.) The BOP considers
3 placement in a female facility to be a necessary and appropriate step toward surgery. (*Id.*
4 ¶ 40.)

5 The BOP authorizes its medical staff to provide medically necessary care to
6 transgender prisoners: “Hormone or other necessary medical treatment may be provided
7 after an individualized assessment of the requested inmate by institution medical staff.”
8 (*Id.* ¶ 41.) When a prisoner is diagnosed with Gender Identity Disorder (“GID”), “a
9 treatment plan will be developed which promotes the physical and mental stability of the
10 patient.” (*Id.* ¶ 42.) Whether or not they were provided prior to incarceration, the plan
11 may include “those elements of the real life experience consistent with the prison
12 environment, hormone therapy, and counseling.” (*Id.* ¶ 43.) “Current, accepted standards
13 of care will be used as a reference for developing the treatment plan. All appropriate
14 treatment options prescribed for prisoners with GID in currently accepted standards of care
15 will be taken into consideration during evaluation by the appropriate medical and mental
16 health care staff.” (*Id.* ¶ 44.) According to the BOP’s Clinical Guidelines: “[i]n many
17 cases, treatment is designed to reduce characteristics of the natal sex and induce those of
18 the identified gender, allowing individuals to project their GENDER IDENTITY. The
19 treatment and management of the TG [Transgender] individual requires individualized care
20 guided by treatment goals to allow for successful TRANSITION through education,
21 counseling, real-life experience, medical evaluation, hormone treatment, and in some
22 cases, gender-affirming surgery.” (*Id.* ¶ 45 (emphasis in original).)

23 The BOP provides hormone treatment in appropriate cases: “Hormone
24 supplementation is an important part of transitional treatment for many transgender
25 individuals.” (*Id.* ¶ 46.) This is based on studies demonstrating “improvement (in the
26 range of 70–80%) in gender dysphoria, mental health, quality of life, and sexual function,
27 for transgender treatment that included hormone therapy.” (*Id.* ¶ 47.) Hormone treatment
28 goals are “(1) to suppress endogenous hormones and physical characteristics of the natal

sex and (2) to supplement hormones to enhance characteristics of the preferred gender, utilizing the principles of hormone replacement therapy for hypogonadal individuals of the TG individual's identified gender." (*Id.* ¶ 48.)

When determining a prisoner's eligibility for hormone therapy, the BOP looks to the eligibility criteria identified by the World Professional Association on Transgender Health ("WPATH") and the Endocrine Society. (*Id.* ¶ 49.)⁵ "Although individuals may live successfully as transgender persons without surgery, gender-affirming surgery may be appropriate for some and is considered on a case-by-case basis." (*Id.* ¶ 50.)

When considering a prisoner for gender-affirming surgery, in addition to the criteria for hormone therapy, the BOP considers whether a prisoner demonstrates "at least 12 months of successful use of hormone therapy, participation in psychotherapy as clinically indicated, full-time real life experience in their preferred gender, and consolidation of gender identity." (*Id.* ¶ 51.) The prisoner is required to request surgery and "demonstrate via informed consent a practical understanding of gender-affirming surgery including, but

⁵ The WPATH Standards of Care ("SOC") recognize that the treatment for gender dysphoria is very individualized, with some patients needing hormones or surgery and some needing neither. (*Id.* ¶ 81.) The WPATH SOC provides: Two referrals—from qualified mental health professionals who have independently assessed the patient—are needed for genital surgery (i.e., hysterectomy/salpingo-oophorectomy, orchiectomy, genital reconstructive surgeries). (*Id.* ¶ 82.) If the first referral is from the patient's psychotherapist, the second referral should be from a person who has only had an evaluative role with the patient. (*Id.*) Two separate letters, or one letter signed by both (e.g., if practicing within the same clinic) may be sent. (*Id.*)

Each referral letter is expected to cover (1) the client's general identifying characteristics; (2) results of the client's psychosocial assessment, including any diagnoses; (3) the duration of the mental health professional's relationship with the client, including the type of evaluation and therapy or counseling to date; (4) an explanation that the criteria for surgery have been met, and a brief description of the clinical rationale for supporting the patient's request for surgery; (5) a statement about the fact that informed consent has been obtained from the patient; and (6) a statement that the mental health professional is available for coordination of care and welcomes a phone call to establish this. (*Id.* ¶ 82.)

Plaintiff does not have a letter from a mental health or medical professional approving her for the surgery. (*Id.* ¶ 83.)

1 not limited to, permanence, potential complications, and short and long-term treatment
2 plans.” (*Id.* ¶ 52.)

3 In designating prisoners, the BOP’s Designation and Sentence Computation Center
4 (“DSCC”) considers relevant Bureau policy on prisoner security and custody classification.
5 (*Id.* ¶ 59.) This policy focuses on three primary factors for making designation decisions:
6 (1) the level of security and supervision the prisoner requires; (2) the level of security and
7 staff supervision the institution is able to provide; and (3) the prisoner’s program needs.
8 (*Id.* ¶ 60.)

9 Other factors to be considered include: the prisoner’s release residence; the level of
10 overcrowding at an institution; any security, location, or program recommendation made
11 by the sentencing court; any Central Inmate Monitoring issues; any additional security
12 measures to ensure the protection of victims/witnesses and the public in general; and, any
13 other factor(s) which may involve the prisoner’s confinement, the protection of society,
14 and/or the safe and orderly management of a Bureau facility. (*Id.* ¶ 61.) The TEC is
15 empowered to recommend that the DSCC re-designate a prisoner. (*Id.* ¶ 62.)

16 The BOP does not ordinarily consider gender-affirming surgery for transgender
17 females until after successful re-designation to a female institution for twelve months. (*Id.*
18 ¶ 63.) Because prisons are segregated by sex, it is not possible for transgender individuals
19 to fully experience their gender in reference to same-gender peers without this experience.
20 (*Id.* ¶ 64.) The BOP has learned through experience that not all transgender women adapt
21 successfully to female prisons. (*Id.* ¶ 65.) In some cases, transgender women have behaved
22 in ways that made it unsafe to maintain them in a female prison and they have had to return
23 to a male prison. (*Id.* ¶ 66.) In other cases, they have requested to return to a male prison.
24 (*Id.* ¶ 67.) Therefore, the TEC views the experience of living in a prison consistent with
25 an individual’s gender identity as a critical step in the transition process. (*Id.* ¶ 68.)

26 If a transgender woman is not able to live in a female prison or does not wish to
27 continue in that setting, it is very important to have this information prior to surgical
28 procedures. (*Id.* ¶ 69.) The BOP makes individualized decisions about transgender

1 prisoner housing, considering, among other factors, gender identity, the safety of all parties
2 and individual prisoner behavior and history. (*Id.* ¶ 70.) This is necessary to ensure the
3 needs of transgender prisoners are addressed and safety is maximized for all prisoners. (*Id.*
4 ¶ 71.) Designation to a facility of the prisoner’s identified gender would be appropriate
5 after consideration of all of the factors and “where there has been significant progress
6 towards transition as demonstrated by medical and mental health history, as well as positive
7 institution adjustments.” (*Id.* ¶ 72.)

8 The BOP has taken steps to move transgender women to female prisons, when the
9 policy requirements are met. (*Id.* ¶ 73.) Currently, six prisoners who are identified in the
10 BOP’s recordkeeping system as transgender are living in institutions consistent with their
11 identified gender. (*Id.* ¶ 74.) A small number of transgender female prisoners previously
12 have been placed in gender-affirming settings, but have been released or returned to male
13 facilities. (*Id.* ¶ 75.)

14 The BOP first reviews safety and security issues with the TEC before
15 recommendations for gender-affirming surgery may be forwarded to the Medical Director
16 for approval. (*Id.* ¶ 76.) When a prisoner has satisfied the criteria for gender-affirming
17 surgery, requests for surgery are transmitted to the Transgender Clinical Care Team
18 (“TCCT”), which makes a recommendation to the Medical Director, who is the approving
19 authority. (*Id.* ¶ 77.) The referrals to the TCCT “should include comprehensive medical
20 and mental health summaries, a comprehensive psychosocial assessment (preferably by a
21 licensed clinical social worker), and a criminal history and institutional adjustment report.”
22 (*Id.* ¶ 78.)

23 On October 10, 2019, the TEC reviewed Plaintiff’s case, and recommended
24 continued placement at USP-Tucson, continual monitoring of hormones and to provide
25 appropriate gender-affirming accommodations. (Doc. 103 ¶ 35.) The TEC did not
26 recommend surgery at that time. (*Id.* ¶ 36.)⁶ Plaintiff was not an appropriate candidate for
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28 ⁶ Plaintiff asserts that there is no evidence her surgery was considered. (Doc. 115
¶ 36.)

1 transfer to a female institution due to her hormone levels not being within the target range
2 for testosterone. (*Id.* ¶ 37.)⁷

3 Neither Dr. Haight-Biehler nor Mr. Brieschke is or has ever been the Medical
4 Director or a member of or advisor to the TEC or the TCCT. (*Id.* ¶ 79.) Plaintiff has
5 admitted that the BOP's Medical Director, not Dr. Haight-Biehler or Mr. Brieschke, has
6 the authority to approve her gender-affirming surgery. (*Id.* ¶ 80.) At all relevant times,
7 Defendant Brieschke was an attorney with the BOP with no authority to prescribe Estradiol
8 patches or direct anyone to do so. (*Id.* ¶ 84.)

9 **IV. Discussion**

10 Defendants assert that they are entitled to summary judgment because Plaintiff's
11 constitutional rights have not been violated, the individual Defendants are entitled to
12 qualified immunity, and Plaintiff's claim for gender-affirming surgery should be dismissed
13 pursuant to the First-to-File rule.

14 **A. First-to-File**

15 Defendants assert that Plaintiff's claim for relief seeking gender-affirming surgery
16 should be dismissed because there is a case pending in the Middle District of Pennsylvania
17 that Plaintiff filed prior to this action, and Plaintiff seeks gender-affirming surgery as relief
18 in that action.

19 Plaintiff filed her Complaint in the Middle District of Pennsylvania on April 3, 2017.
20 (*Pinson v. United States*, No. 1:17-cv-00584-SHR-SM (M.D. Penn.), Doc. 1.) In that
21 action, Plaintiff alleged three claims: (1) an FTCA claim against the United States based
22 on events that allegedly occurred while Plaintiff was incarcerated in the United States
23 Penitentiary in Allenwood, Pennsylvania;⁸ (2) a *Bivens* claim against individual Defendant
24 Magyars and Santos based on Plaintiff's claim that they were deliberately indifferent to

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26 ⁷ Plaintiff asserts that the TEC did not consider this. (*Id.* ¶ 37.)

27 ⁸ The FTCA claim alleged in Plaintiff's action in the Middle District of
28 Pennsylvania is entirely distinct from any claim in this action and, therefore, the Court will
not discuss the facts of that claim in this Order.

1 Plaintiff's serious medical needs when they denied her gender-affirming surgery; and (3) a
2 claim for "injunctive relief" against the BOP. (*Id.* at Doc. 11 at 1.) Plaintiff specifically
3 alleged a claim regarding the BOP's policy regarding gender-affirming surgery and sought
4 an injunction requiring the BOP to provide her with gender-affirming surgery. (*Id.* at 1-4.)

5 Thereafter, Defendants moved for summary judgment, and the Court granted
6 summary judgment in favor of all Defendants; Judgment was entered on February 26, 2018.
7 (*Id.* at Docs. 55, 57.) Plaintiff appealed the Judgment to the Third Circuit Court of Appeals,
8 and the Third Circuit reversed and remanded the action to the Middle District of
9 Pennsylvania. *Pinson v. United States*, No. No. 18-3051, 826 F. App'x 237 (3d Cir. Sept.
10 9, 2020).

11 The Third Circuit Court of Appeals noted that Plaintiff filed an Eighth Amendment
12 *Bivens* claim against the individual Defendants, and also noted that Plaintiff had stated an
13 FTCA claim against the United States and the Federal Bureau of Prisons. (*Id.* at 240.)
14 Although the Third Circuit noted that Plaintiff sought injunctive relief in the form of
15 gender-affirming surgery, the Third Circuit did not recognize that Plaintiff alleged the
16 claim for injunctive relief as a separate claim against the BOP. (*Id.*)

17 In discussing Plaintiff's Eighth Amendment claims against the individual
18 Defendants, the Third Circuit stated that Plaintiff alleged that those Defendants denied
19 Plaintiff gender-affirming surgery for non-medical reasons because they allegedly told
20 Plaintiff that she was being denied the gender-affirming surgery "because [she] had
21 requested it in a request for administrative remedy and also stated if [she] continued to file
22 on staff [she] would just be transferred and receive no treatment" and both Defendants
23 allegedly told her that the BOP "would never provide gender-affirming surgery [and] that
24 'for political reasons we will consider it as a policy but never actually follow through'
25 because 'FOX News and Republicans would go crazy.'" (*Id.* at 242.) The Third Circuit
26 stated that a reasonable jury could find that the individual Defendants were deliberately
27 indifferent to Plaintiff's serious medical needs if they found that the individual Defendants
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1 denied Plaintiff gender-affirming surgery for non-medical reasons. (*Id.*) The Third Circuit
2 also reversed the District Court’s Judgment as to the FTCA claim. (*Id.* at 243.)

3 On December 9, 2020, the Third Circuit issued its Mandate, and thereafter the Court
4 appointed Plaintiff counsel; due to requests for extensions of time made by all Parties, the
5 trial in that action is currently set for April 24, 2023. (*Pinson v. United States*, No. 1:17-
6 cv-00584-SHR-SM (M.D. Penn.), Docs. 67, 74, 79, 96.)

7 “The first-to-file rule allows a district court to stay proceedings if a similar case with
8 substantially similar issues and parties was previously filed in another district court.” *Kohn*
9 *L. Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015).
10 “The first-to-file rule is intended to serve the purpose of promoting efficiency well and
11 should not be disregarded lightly.” *Id.* (citation omitted). “When applying the first-to-file
12 rule, courts should be driven to maximize “economy, consistency, and comity, and must
13 consider three factors: chronology of the lawsuits, similarity of the parties, and similarity
14 of the issues.” *Id.* at 1240 (citations omitted).

15 Here, there is no question that the first two factors are satisfied: Plaintiff filed the
16 action in the Middle District of Pennsylvania first, and the United States and BOP are
17 Defendants to both lawsuits. *See id.* (the First-to-File rule does not require exact identity
18 of the parties, only substantial similarity.).

19 With regard to the third factor, the claims needs not be identical but must be
20 substantially similar, and to determine substantial similarity the Court must examine
21 whether there is “substantial overlap” between the two suits. *Id.* at 1241. Defendants
22 summarily argue that the First-to-File rule should apply because Plaintiff seeks the same
23 injunctive relief in both lawsuits, but Defendants do not discuss whether there is substantial
24 overlap between the claims (as opposed to the relief sought) in the two suits. In short, the
25 briefing on this issue is sparse and incomplete. In the Pennsylvania action, Plaintiff seeks
26 gender-affirming surgery as relief, but Plaintiff cannot obtain such relief from the
27 individual Defendants to the Eighth Amendment *Bivens* claim to that lawsuit. Although
28 the United States and BOP are Defendants to the FTCA claim in that lawsuit, Plaintiff

1 would not be able to obtain injunctive relief in the form of gender-affirming surgery with
2 regard to that FTCA claim.

3 It is unclear whether the Middle District of Pennsylvania is treating Plaintiff's
4 request for injunctive relief as a separate claim against the United States and Federal
5 Bureau of Prisons such that Plaintiff could obtain the relief of gender-affirming surgery.
6 Although Plaintiff alleged that the individual Defendants told her that the BOP had a
7 practice of not providing gender-affirming surgery because "FOX News and Republicans
8 would go crazy," it does not appear that the Middle District of Pennsylvania or the Third
9 Circuit Court of Appeals have treated that as an allegation challenging the BOP's practices
10 such that Plaintiff would be entitled to gender-affirming surgery as injunctive relief in that
11 action. Without further information about the extent to which the Middle District of
12 Pennsylvania is construing Plaintiff's claims, the Court cannot find on this record that the
13 Middle District of Pennsylvania plans to address allegations relating to the BOP's policies
14 regarding gender-affirming surgery, and Defendants' Motion for Summary Judgment
15 based on the First-to-File rule will be denied.

16 **B. Defendant Brieschke**

17 In her First Amended Complaint, Plaintiff alleged that Defendant Brieschke, an
18 attorney for the BOP, was responsible for the denial of Plaintiff's gender-affirming surgery
19 and hormone treatments because "in early 2019, Defendant Brieschke . . . advised . . .
20 Biehler that 42 USC 12211 et seq. prohibited all such treatments." (Doc. 8 at 3.)

21 Under the Eighth Amendment standard, a prisoner must demonstrate "deliberate
22 indifference to serious medical needs." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)
23 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). There are two prongs to the deliberate-
24 indifference analysis: an objective standard and a subjective standard. First, a prisoner
25 must show a "serious medical need." *Jett*, 439 F.3d at 1096 (citations omitted). A
26 "'serious' medical need exists if the failure to treat a prisoner's condition could result in
27 further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin*
28 *v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by WMX Techs.,*

1 *Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal citation omitted).
2 Examples of indications that a prisoner has a serious medical need include “[t]he existence
3 of an injury that a reasonable doctor or patient would find important and worthy of
4 comment or treatment; the presence of a medical condition that significantly affects an
5 individual’s daily activities; or the existence of chronic and substantial pain.” *McGuckin*,
6 974 F.2d at 1059-60.

7 Second, a prisoner must show that the defendant’s response to that need was
8 deliberately indifferent. *Jett*, 439 F.3d at 1096. The state of mind required for deliberate
9 indifference is subjective recklessness; however, the standard is “less stringent in cases
10 involving a prisoner’s medical needs . . . because ‘the State’s responsibility to provide
11 inmates with medical care ordinarily does not conflict with competing administrative
12 concerns.’” *McGuckin*, 974 F.2d at 1060 (quoting *Hudson v. McMillian*, 503 U.S.1, 6
13 (1992)). Whether a defendant had requisite knowledge of a substantial risk of harm is a
14 question of fact, and a fact finder may conclude that a defendant knew of a substantial risk
15 based on the fact that the risk was obvious. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).
16 While the obviousness of the risk is not conclusive, a defendant cannot escape liability if
17 the evidence shows that the defendant merely refused to verify underlying facts or declined
18 to confirm inferences that he strongly suspected to be true. *Id.*

19 “Prison officials are deliberately indifferent to a prisoner’s serious medical needs
20 when they deny, delay, or intentionally interfere with medical treatment.” *Hallett v.*
21 *Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (internal citations and quotation marks
22 omitted). Deliberate indifference may also be shown by the way in which prison officials
23 provide medical care, *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988), or
24 “by circumstantial evidence when the facts are sufficient to demonstrate that a defendant
25 actually knew of a risk of harm.” *Lolli v. Cnty. of Orange*, 351 F.3d 410, 421 (9th Cir.
26 2003). And deliberate indifference may be shown by a purposeful act or failure to respond
27 to a prisoner’s pain or possible medical need. *Jett*, 439 F.3d at 1096. But the deliberate-
28 indifference doctrine is limited; an inadvertent failure to provide adequate medical care or

1 negligence in diagnosing or treating a medical condition does not support an Eighth
2 Amendment claim. *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (citations
3 omitted). Further, a mere difference in medical opinion does not establish deliberate
4 indifference. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).

5 Finally, even if deliberate indifference is shown, to support an Eighth Amendment
6 claim, the prisoner must demonstrate harm caused by the indifference. *Jett*, 439 F.3d at
7 1096; *see Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (delay in providing
8 medical treatment does not constitute Eighth Amendment violation unless delay was
9 harmful).

10 There is no evidence in the record that Brieschke had authority over Plaintiff's
11 medical treatment or that Defendant Haight-Biehler made any medical decisions for
12 Plaintiff based on Defendant Brieschke's advice. Indeed, the evidence before the Court
13 shows that Brieschke did not have authority over Plaintiff's medical treatments, that
14 Plaintiff was prescribed hormone treatments, and that neither Brieschke or Haight-Biehler
15 made decisions with regard to the appropriateness of gender-affirming surgery.
16 Accordingly, there is no evidence that Brieschke was deliberately indifferent to Plaintiff's
17 serious medical needs and summary judgment will be granted in favor of Defendant
18 Brieschke.

19 **C. Defendant Haight-Biehler**

20 **1. Estradiol Pills**

21 In December 2015, Plaintiff was prescribed the Estradiol patch, but after
22 complaining of problems with adhesion, in April 2016, she was prescribed the Estradiol in
23 pill form. (*Id.* ¶ 7.) Plaintiff claims that when she was transferred to USP-Tucson on
24 February 15, 2018, she began requesting that she receive Estradiol in patch form. Plaintiff
25 includes no details, outside of a general time range, about when she requested the patch
26 and what she was told in response to her requests. Defendants assert that in December
27 2018, Plaintiff requested that her estrogen be changed from a pill to a patch, at which time
28 Plaintiff's Estradiol prescription was changed to a .025mg Estradiol patch.

1 Even assuming Plaintiff began requesting her Estradiol in patch form in February
 2 2018, there is nothing in this record showing that Dr. Haight-Biehler refused to change the
 3 prescription based on deliberate indifference to Plaintiff's serious medical needs, or that
 4 continuing Estradiol in pill form and not patch form posed a serious risk of harm to
 5 Plaintiff. Accordingly, summary judgment will be granted in favor of Dr. Haight-Biehler
 6 as to Plaintiff's claim that she was given Estradiol in pill form instead of patch form for 10
 7 months.

8 **2. Gender-affirming surgery**

9 There is no evidence in the record before the Court that Dr. Haight-Biehler denied
 10 Plaintiff gender-affirming surgery or had authority to deny Plaintiff gender-affirming
 11 surgery. Rather, the record shows that the Warden twice forwarded Plaintiff's request for
 12 gender-affirming surgery to the TEC for consideration and the TEC denied the request
 13 while advising about possible treatments, such as increasing Plaintiff's Spironolactone
 14 dosage, and that Dr. Haight-Biehler acted on those recommendations. The evidence shows
 15 that Dr. Haight-Biehler was not a member of the TEC and had no authority over the TEC's
 16 decisions. Accordingly, there is no evidence that Dr. Haight-Biehler denied Plaintiff
 17 gender-affirming surgery or was otherwise involved with decisions regarding whether
 18 Plaintiff would be considered for gender-affirming surgery, and therefore, no evidence that
 19 Dr. Haight-Biehler was deliberately indifferent to Plaintiff's serious medical needs based
 20 on the denial of gender-affirming surgery, and summary judgment will be granted in favor
 21 of Dr. Haight-Biehler.

22 **D. Policy Claims—Eighth Amendment and Fifth Amendment**

23 “Although the Fifth Amendment does not have an equal protection clause, it does
 24 contain a due process clause which prohibits the federal government from engaging in
 25 discrimination that is ‘so unjustifiable as to be violative of due process,’ and ‘provides the
 26 same protection and requires the same analysis as Fourteenth Amendment equal
 27 protection.’” *Rodriguez v. Cook*, 169 F.3d 1176, 1178-79 (9th Cir. 1999); *see Weinberger*
 28 *v. Wiesenfeld*, 420 U.S. 636, 638 n.2(1975) (the approach to Fifth Amendment due process

1 claims is “precisely the same as to equal protection claims under the Fourteenth
2 Amendment.”) (citations omitted).

3 A Fourteenth Amendment equal protection claim may be established by showing
4 that prison officials intentionally discriminated against a plaintiff based on her membership
5 in a protected class. *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d
6 690, 70203 (9th Cir. 2009); *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003), *Lee*
7 *v. City of L.A.*, 250 F.3d 668, 686 (9th Cir. 2001). The Court must apply heightened
8 scrutiny to Plaintiff’s claim that the BOP’s policies discriminate against her based on her
9 transgender status. *See Hecox v. Little*, 479 F. Supp. 3d 930, 972–75 (D. Idaho 2020)
10 (citing cases). “The purpose of this heightened level of scrutiny is to ensure quasi-suspect
11 classifications do not perpetuate unfounded stereotypes or second-class treatment, and
12 therefore, “[t]o withstand heightened scrutiny, classification by sex must serve important
13 governmental objectives and must be substantially related to achievement of those
14 objectives.” *Id.* (internal citations omitted).

15 Here, the BOP argues that the requirements set forth before a prisoner may qualify
16 for gender-affirming surgery are in place for the institution’s safety and security, and are
17 based on individualized determinations with regard to whether a particular prisoner has
18 met the medical and mental health requirements prior to obtaining gender-affirming
19 surgery. Defendants assert that Plaintiff has not met the requirements under the policy
20 because she is classified maximum custody and has not successfully completed hormone
21 therapy, both of which prevent her from transfer to a female prison, where she could gain
22 real world experience as a member of her proposed gender; that Plaintiff has not obtained
23 the appropriate letters from medical providers indicating that she is in need of gender-
24 affirming surgery; and that Plaintiff has not successfully completed hormone therapy. The
25 BOP produces evidence that there are currently six transgender prisoners living in
26 institutions consistent with their identified gender, which, under the policy, is one of the
27 steps necessary to obtaining a recommendation for gender-affirming surgery.
28

1 In Response, Plaintiff argues that this is not the BOP's policy, but produces no
2 evidence to contradict Defendants' evidence that these are their policies. Plaintiff also does
3 not present a facial challenge to the policy by arguing that the requirements themselves
4 violate either Plaintiff's rights to equal protection or to be free from cruel and unusual
5 punishment. Rather, Plaintiff presents new claims not alleged in her First Amended
6 Complaint, that she is being prevented from meeting the requirements of the policy because
7 (1) Defendants falsely categorize her as a maximum security inmate and/or she is forced
8 to take actions that ensure she will be kept in maximum security for her own protection
9 because prison officials refuse to otherwise protect her,⁹ (2) she was never given the Lupron
10 ordered by Dr. Haight-Biehler to help with her hormone levels, her hormone levels were
11 not regularly tested while she was in the custody of USP-Tucson, and she has never been
12 given a "treatment plan," and (3) the TEC has never actually considered whether she is a
13 candidate for gender-affirming surgery.

14 While the Court is sympathetic to Plaintiff's pro se status and her allegations and
15 arguments are serious, the Court only has jurisdiction over the claims that Plaintiff brought
16 in her First Amended Complaint. In her First Amended Complaint, Plaintiff specifically
17 alleged that the BOP would not consider her for gender-affirming surgery on an individual
18 basis and there was no policy in place for Plaintiff to be considered on an individual basis.
19 Now, Plaintiff appears to concede that there is a policy, that she does not meet the
20 requirements for gender-affirming surgery pursuant to the policy, but that she is prevented
21 from meeting the policy requirements for various reasons. This is an entirely new claim
22 that was never alleged in Plaintiff's First Amended Complaint. For purposes of fairness in
23 the discovery process and the Prison Litigation Reform Act's requirements relating to
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25 ⁹ Although Plaintiff put the BOP on notice that she wanted gender-affirming surgery
26 and exhausted her administrative remedies as to that claim, there is no evidence that
27 Plaintiff has ever notified BOP or exhausted a claim that she is wrongfully classified in
28 maximum custody as a pretext for denying her gender-affirming surgery or that she has
had to ensure that she maintain her maximum custody status because the BOP refuses to
protect her.

1 exhaustion, the Court must not decide claims that are not before it. Plaintiff's claims that
2 prison officials refuse to protect her, forcing her to take actions that result in a maximum
3 security designation and Plaintiff's allegations that prison officials have told her that she
4 will never be removed from maximum security were not alleged in her First Amended
5 Complaint, and are therefore not properly before the Court in this action. Likewise,
6 Plaintiff's allegations regarding Lupron¹⁰ and not being regularly tested for hormones are
7 not before the Court in this action.

8 The evidence before the Court shows that Plaintiff was on hormone therapy, that
9 her doctor reviewed her hormone therapy and changed it as she believed was medically
10 necessary in order to get Plaintiff's hormones to appropriate levels, that the TEC made
11 some recommendations for changes in Plaintiff's hormones, and that Dr. Haight-Biehler
12 considered those changes and made the changes, and the record reflects that before
13 Plaintiff's transfer out of USP-Tucson, Dr. Haight-Biehler was still attempting to make
14 changes to Plaintiff's medications in order to assist Plaintiff in succeeding with hormone
15 therapy.

16 Accordingly, although Plaintiff argues that there was no "plan" in place for her
17 medical treatment relating to gender dysphoria, the record evidence shows that Plaintiff's
18 providers were providing her medical treatment relating to her gender dysphoria and that
19 whether or not there was a memorialized "plan," her providers were working to provide
20 Plaintiff hormone therapy. Moreover, the record reflects that Plaintiff's allegation that the
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22 ¹⁰ There is no evidence before the Court as why the Lupron requested by Dr. Haight-
23 Biehler was not distributed to Plaintiff, whether this was the result of negligence, or who
24 was responsible for the failure to provide Plaintiff Lupron while Plaintiff was housed at
25 USP-Tucson. It is unclear whether Plaintiff has exhausted any claims relating to the
26 provision of Lupron, and Defendants were not given notice in this action about this portion
27 of Plaintiff's claim. Moreover, because there is no evidence in this record that Dr. Haight-
28 Biehler—who twice sought approval to get Plaintiff Lupron—was deliberately indifferent
to Plaintiff's serious medical needs, and Plaintiff is no longer in Dr. Haight-Biehler's care,
Plaintiff would not be entitled to damages against Dr. Haight-Biehler or any injunctive
relief related to this claim in this action. There is no allegation or evidence that the failure
to provide Plaintiff Lupron was the result of a policy of the BOP.

1 TEC never considered her to be a candidate for gender-affirming surgery is correct insofar
2 as the TEC required Plaintiff to meet the necessary requirements under the policy before
3 they would consider her to be a candidate for gender-affirming surgery. There is no
4 evidence in the record that Plaintiff met the requirements necessary under the policy to be
5 considered a candidate for gender-affirming surgery.

6 The BOP offers multiple reasons why, prior to a recommendation for gender-
7 affirming surgery, it requires hormone levels to meet certain requirements and requires
8 placement in a female institution, and that before placement in a female institution, a
9 Plaintiff must meet certain custody classification requirements and must successfully
10 complete hormone therapy. The BOP also asserts that it requires the recommendation of
11 medical providers before considering a prisoner for gender-affirming surgery.¹¹ There is
12 no evidence in this record showing that these requirements are not for important
13 government objectives or are not substantially related to the achievement of those
14 objectives. Likewise, Plaintiff has produced no evidence, on this record, that these policies
15 are deliberately indifferent to her serious medical needs. Accordingly, on the record
16 currently before the Court, there is no evidence that the BOP's policies, as applied to
17 Plaintiff, violate the Fifth or Eighth Amendments, and as discussed above, Plaintiff does
18 not facially challenge the policies or present evidence demonstrating that the policies are
19 facially unconstitutional. Accordingly, the Court will dismiss without prejudice Plaintiff's
20 claims for permanent injunctive relief against the Defendant United States and Federal
21 Bureau of Prisons based on alleged violations of her Fifth and Eighth Amendment rights
22 with regard to the denial of gender-affirming surgery.


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26 ¹¹ Defendants do not explain how a prisoner would obtain two recommendations
27 from medical providers while housed in prison, but because Plaintiff has not shown she
28 has met the other requirements under the policy and has not produced evidence showing
that the other requirements violate her constitutional rights, the Court need not address that
assertion at this time.

1 **IT IS ORDERED** that Defendants' Motion for Summary Judgment (Doc. 102) is
2 **granted**. Plaintiff's claims for injunctive relief relating to the denial of gender-affirming
3 surgery are **dismissed without prejudice**. Plaintiff's Eighth Amendment claims against
4 Defendants Haight-Biehler and Brieschke are **dismissed with prejudice**. This action is
5 terminated with prejudice. The Clerk of Court must enter judgment accordingly.

6 Dated this 13th day of April, 2022.

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11 Honorable Rosemary Márquez
12 United States District Judge
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